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No. 84-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JESSIE R. GOOLSBY,

Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the trial court commit reversible error in refusing to admit into evidence the Federal Railroad Administration's regulations concerning track structure, 49 C.F.R. §§ 213.101 and 213.103, in the absence of sponsoring testimony and without any foundation for admission?

PARTIES INVOLVED

The respondent Norfolk & Western Railway Company (hereafter NW) is a Virginia Corporation. On September 6, 1983, counsel for NW certified to the United States Court of Appeals for the Fourth Circuit that NW is a subsidiary of the Norfolk Southern Corporation and that no publicly-owned corporation, not a party to the case, had a financial interest in the outcome.

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STATEMENT OF THE CASE

NW generally agrees with petitioner Goolsby's (hereafter Goolsby) statement of the case. However, it should be noted that there was some evidence that Goolsby violated a railroad safety rule in the way he lifted the jack, that he knew NW had rules on safety, particularly on how to lift heavy objects, and that Goolsby knew the jack had sunk in the mud. There was also some evidence that Goolsby told the operating physician that he had jerked the jack.

ARGUMENT

The Complaint initiating this case contained allegations of negligence under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.* (hereinafter FELA). The plead-

ings did not refer to either the Railroad Safety Act of 1970, as amended, 45 U.S.C. §§ 421 *et seq.* or Title 49, Chapter II of the Code of Federal Regulations, 49 C.F.R. §§ 200.1 *et seq.*

The case was tried under FELA. The regulations in question, 49 C.F.R. §§ 213.101 & §§ 213.103, became an issue only when Goolsby proffered them at the conclusion of his evidence without testimony or foundation and NW objected to their admission. Judge Bullock sustained NW's objection and submitted the case to the jury after proper instructions under FELA.

Judge Bullock was correct in his ruling for two reasons. First, 49 C.F.R. §§ 213.101 & 213.103 are irrelevant to the duty owed by a railroad to a maintenance of way employee. Second, even if relevant, the regulations were merely cumulative and were properly excluded under Rule 403, Federal Rules of Evidence, because of a clear danger of unfair prejudice, confusion of the issues, and misleading of the jury as well as undue delay and waste of time.

Even if this Court accepts Goolsby's argument that the regulations acquire the force of law, relevancy and applicability must still be demonstrated. This case is no different than an ordinary negligence lawsuit arising from an automobile accident where a defendant driver is driving without a license. Driving without a license is unlawful but irrelevant unless the plaintiff can establish that driving without a license caused or contributed to the injuries. If plaintiff cannot do that, the violation of law is irrelevant to the case and thus inadmissible. *See*, Annot., 29 A.L.R. 2d 963 (1953 & Supp.).

Coming at the end of all the evidence (NW presented no evidence), admission of the proffered regulations would

have served no purpose other than as cumulative evidence to that already presented. Further, Goolsby's proffer of the regulations did not contain any reference to their applicability to the facts of the case or to reasons for their introduction. At that point, there was no evidence that the regulations even covered the area where Goolsby was working. Had they been admitted, no witnesses would have been available for cross-examination. Explanation of their relevance and applicabillty would have been delegated either to counsel in closing arguments or the Court in its instructions, all without a proper foundation ever having been laid for admission. Under those circumstances, their probative value would have been suspect; either it would have been slight or, improperly highlighted, it could have been unfair and extremely prejudicial to NW. Improperly highlighting the regulations, without any foundation or explanation of relevance and applicability, would have impermissibly elevated, in the jury's mind, the standard of care owed by NW to either a standard of strict liability or that violation of the regulations constituted negligence *per se*. Neither standard is a correct application of law under FELA on the facts of this case.

It is important to reiterate that this case was submitted to a jury for determination and that NW offered no evidence. This is not a case where the trial judge directed a verdict for the railroad or set aside the jury's verdict in favor of a plaintiff. As acknowledged by this Court in *Rogers* v. *Missouri Pacific RR.*, 352 U.S. 500, 509, 1 L.Ed.2d 493, 501, 77 S. Ct. 443, ____ (1957),

> cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determina-

> tion . . . The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination.

In this case Goolsby was allowed a jury determination. It happened to be adverse to his interest. On this point, Justice Frankfurter's dissent in *Rogers* is even more persuasive today than in 1957, particularly his repetition of his dissent in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 64, 66, 93 L.Ed. 497, 505, 506, 69 S. Ct. 413, ____, (1949):

> Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division in this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances. For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough.

Goolsby misapprehends the construction of FELA vis-a-vis the Railroad Safety Act and regulations promulgated thereunder. The scope of Part 213, Track Safety Standards, 49 C.F.R. § 213.1 *et seq.* is "to provide for safe operations over that track." 49 C.F.R. § 213.1. Therefore, the entire Part is irrelevant to the issue of what duty a railroad owes to a maintenance of way employee. Had Congress intended otherwise, it would have been a simple matter to amend any of the various railroad safety acts to insure that a failure to maintain track structure subjected the railroad to strict liability in the event of an employee injury.

The statement in the Railroad Safety Act, 45 U.S.C. § 437(c), that regulations shall have the same force and effect as a statute for purposes of the application of §§ 53 and 54 of this title does not elevate the Act to a standard of absolute liability, as implied by Goolsby. Goolsby's attempt to prove negligence by NW through the general language of the Railroad Safety Act, without any effort to establish relevancy or applicability to the facts of this case is merely an effort to obtain a second appellate review of an adverse trial decision, a review well outside the customary scope of reveiw granted by this Court in the exercise of its certiorari jurisdiction.

Goolsby's reliance, by analogy, on *Brady* v. *Terminal RR Association*, 303 U.S. 10, 82 L.Ed. 614, 58 S.Ct. 426 (1938); *Chicago Junction Ry.* v. *King*, 169 F. 372 (7th Cir. 1909); and *Holfester* v. *Long Island RR*, 360 F.2d 269 (2d Cir. 1966) is misplaced. *Brady* and *King* were decided under the Safety Appliance Act, 45 U.S.C. §§ 1 *et seq.*, and *Holfester* was decided under the Boiler Inspection Act, 45 U.S.C. §§ 22 *et seq.* Both Acts impose absolute liability if the defective equipment is the proximate cause of the injury. This standard of care is sufficient to distin-

guish those three cases from the case at bar. The ultimate thrust of the absolute liability imposed by these Acts requires a jury finding that the equipment was defective and a proximate cause of the injury. The instant case was submitted to the jury on FELA instructions concerning the railroad's duty to its employees to furnish them a safe place to work and suitable equipment with which to work in addition to the trial court's charge that railroad negligence of even the slightest degree is sufficient to impose liability. The jury's verdict is persuasive evidence that Goolsby's injuries were due to his sole negligence.

A railroad is not under a duty to be perfect. For this Court to grant certiorari, and possibly reverse the jury verdict in this case, will amount practically to a condemnation of jury trials in FELA cases or make the railroad an insurer of the safety of employees.

CONCLUSION

For the reasons listed herein, NW respectfully requests this Court to deny certiorari and dismiss the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned hereby certifies that the pleading or paper to which this certificate is affixed was served upon C. Richard Grieser, Counsel of Record, Grieser, Schafer, Blumenstiel & Slane Co., L.P.A., 261 West Johnstown Road, Columbus, Ohio 43230, by depositing a copy of the same, enclosed in a first class, postpaid wrapper properly addressed and placed in a post office or official depository under the care and custody of the United States Postal Service, on this ____ day of August, 1984.

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